United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

77-1245
77-1246

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 77-1245, 77-1246

UNITED STATES OF AMERICA,

Appellee,

v.

VANKIRK MOORE and HAROLD BURNELL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT
HAROLD BURNELL

UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR DEFENDANT-APPELLANT HAROLD BURNELL

Defendant-appellant Harold Burnell submits this reply brief in order to respond to the most significant errors of fact and law in the Brief for the United States of America ("Gov't Br.").

POINT I

DEFENDANT DID NOT WAIVE THE GOVERNMENT'S FAILURE TO PROVE INTERSTATE TRANSPORTATION OR THE UNCONSTITUTIONALITY OF THE PRESUMPTION OF INTERSTATE TRANSPORTATION

Before addressing any of the substantive issues raised by the present appeal, the Government argues at length that the defendants waived both the Government's failure to prove by sufficient evidence that Mr. Huggins was transported in interstate or foreign commerce and the unconstitutionality of the presumption of interstate transportation contained in 18 U.S.C. § 1201(b) (Gov't Br. 14-24). Both of these arguments of waiver are without merit.

We shall show in Point A below that the defendants fully preserved on the record their objection to the insufficiency of the evidence that Mr. Huggins was transported in interstate or foreign commerce. We shall show in Point B below that, although no objection was made to the District Court's charge in terms of the presumption of 18 U.S.C. § 1201(b), there was no intention to waive the unconstitutionality of the presumption, and the charge incorporating the presumption was plain error affecting the substantial rights of the defendant.

A. The Objection to the Insufficiency of the Evidence of Interstate or Foreign Transportation Was Fully Preserved on the Record

Both defendants made motions for a judgment of acquittal on all four counts of the indictment (Tr. 1421-1425,

1666-1688). Defendants thereby preserved their objection to the insufficiency of the Government's proof of each of the elements of the crimes charged, including the jurisdictional element of interstate or foreign transportation on Counts One and Two of the indictment, without the necessity of any specific objection on each element.* However, in addition to moving generally for a judgment of acquittal, defendants specifically objected to the insufficiency of the evidence of interstate or foreign transportation.

At the very outset of the discussion of defendants' motions for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, counsel for defendant Moore stated:

> "MR. HOCHHEISER: Well, I would just like to add, your Honor, that as to Count 2, that the defendants Burnell and Moore took Buster Huggins and transported him in interstate and foreign commerce, that I think there is no evidence of that. . . ." (Tr. 1421.)**

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* As this Court held in United States v. Norton, 179 F.2d 527, 529 (2d Cir. 1950), a conviction resting upon insufficient evidence should be reversed even in the absence of an objection, because "[t]here can be no plainer error or defect than the absence of evidence justifying a conviction."

** The Government argues that this statement constituted part of defendants' Rule 12 motions (Gov't Br. 14 n.*). The record makes plain, however, that this argument marked the commencement of defendants' Rule 29 motions. As soon as counsel for Moore made this statement, the Assistant United States Attorney said, "Is this a sufficiency motion now?" and "Is this a Rule 29 motion at the close of the government's case?" (Tr. 1421.) The discussion then turned to the manner in which defendants would present their Rule 29 motions (Tr. 1422-1425).

Counsel for defendant Burnell joined in this argument (Tr. 1419-1420). Thereafter, it was agreed that the argument of defendants' Rule 29 motions would be deferred to the next day (Tr. 1424-1425).

During the argument of defendants' Rule 29 motions the next day, a colloquy took place which makes crystal clear that all parties understood that defendants were attacking the sufficiency of the Government's proof of interstate or foreign transportation. At the outset of the colloquy the Assistant United States Attorney expressly referred to the Government's burden of proving interstate or foreign transportation:

> "MR. KAPLAN: If Mr. Thau [counsel for Burnell] will concede me that they took Buster Huggins into New Jersey or Connecticut on this count [Count Four], we may be able to deal with respect to Count 2 a little bit easier." (Tr. 1670.)

Counsel for Burnell flatly declined to enter into the stipulation suggested by the Government:

> "MR. THAU: Your Honor, I make no such concession because I don't know where Buster is." (Tr. 1670.)

At the end of the argument of defendants' Rule 29 motions, counsel for defendant Burnell expressly requested the District Court to consider defendants' arguments "with our argument made yesterday as our Rule 29 motion, at the end of the case" (Tr. 1687), thus incorporating by reference the argument based on the insufficiency of the evidence of inter-

state or foreign transportation which had been made the day before (see pp. 3-4 supra).

Thus the record establishes beyond question that defendants expressly preserved their objection to the Government's failure to prove that Mr. Huggins was transported in interstate or foreign commerce. Indeed, the record is so clear on this point that it is surprising that the Government has attempted to argue otherwise.

B. Defendant Did Not Waive the Unconstitutionality of the Presumption of 18 U.S.C. § 1201(b)

The Government alleges that defendants made "a strategic and tactical decision" not to challenge the constitutionality of the presumption of 18 U.S.C. § 1201(b) (Gov't Br. 22-24). Unfortunately, the Government has failed to present to this Court the full facts bearing upon this issue, which conclusively refute the Government's allegation of waiver.

After the defendants had filed their initial briefs on the present appeal, the Government made a motion in the District Court to add to the record on appeal, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, affidavits of two Assistant United States Attorneys supposedly supporting the Government's allegation of waiver. Responsive affidavits were filed by defendants and their trial counsel, and the District Court denied the Government's motion. Although the Government's brief refers glancingly to the District Court's

denial of its motion to supplement the record (Gov't Br. 22 n.*), it says nothing about the affidavits submitted by defendants and their trial counsel, which refute the Government's allegation of waiver.*

The Government's affidavits claimed, on the basis of a conversation before the trial between one Assistant United States Attorney and the trial counsel for defendant Moore, and a conversation after this appeal was taken between another Assistant United States Attorney and the trial counsel for defendant Burnell, that the defendants made a conscious tactical choice not to object to Federal jurisdiction and not to attack the constitutionality of 18 U.S.C. § 1201(b) (12a-14a, 15a-16a). Insofar as these affidavits claimed that defendants made a decision not to attack the insufficiency of the evidence of interstate or foreign transportation, of course, they are flatly contrary to the record (see pp. 2-5 supra). With respect to the constitutionality of 18 U.S.C. § 1201(b), trial counsel for both defendants stated in their affidavits that the only reason they did not object to the District Court's charge in terms of 18 U.S.C. § 1201(b) was that it had not occurred to them that the presumption might

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* The affidavits submitted by the Government to the District Court in support of its motion to supplement the record are annexed hereto as pages 3a-16a; the affidavits submitted by defendants and their trial counsel are annexed as pages 17a-27a; and the decision of the District Court refusing to add the affidavits to the record on appeal is annexed as pages 28a-30a.

be unconstitutional (18a, 23a-24a). Similarly, both defendants stated in their affidavits that they had not authorized their trial counsel to waive any objection to the constitutionality of 18 U.S.C. § 1201(b) (20a, 27a).

Thus the affidavits submitted to the District Court make clear that there was no decision by defendants or by their trial counsel to waive the unconstitutionality of the presumption of 18 U.S.C. § 1201(b). In denying the Government's motion to add to the record the affidavits dealing with its allegation of waiver, the District Court expressly stated that

> "there is nothing in the record, as I recall, with respect to the matter. It would be inappropriate to add materials with respect to those thought processes to the record at this point, since all of my legal rulings (and certainly all of the jury's factual determinations) were made without benefit of knowledge of those processes." (29a.)

Without setting forth any of the foregoing facts, the Government's brief argues that defendants' attack on the constitutionality of 18 U.S.C. § 1201(b) should be foreclosed by the fact that no objection was made at trial to the charge in terms of 18 U.S.C. § 1201(b) (Gov't Br. 16-24). Insofar as the unconstitutionality of 18 U.S.C. § 1201(b) is a necessary element of defendants' contention that the evidence of interstate transportation was insufficient, the constitutionality of 18 U.S.C. § 1201(b) is before this Court for decision quite independently of the question of the validity of the District Court's charge in terms of 18 U.S.C. § 1201(b) (see

pp. 2-5 supra).*

Moreover, under the circumstances of this case the charge to the jury incorporating 18 U.S.C. § 1201(b) should also be noticed by this Court pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure as plain error affecting the substantial rights of the defendant. The circumstances of this case are far removed from those in United States v. Coke, 364 F.2d 484, 485 (2d Cir. 1966), cert. denied, 386 U.S. 918 (1967), upon which the Government relies (Gov't Br. 20-21). The presumption involved in the Coke case had been in constant use in Federal narcotics prosecutions for many years, and its unconstitutionality was far from clear at the time of the Coke decision, which was decided before Leary v. United States, 395 U.S. 6 (1969). In the present case, as shown in our initial brief (pp. 22-35) and in Point II below, the unconstitutionality of the presumption of 18 U.S.C. § 1201(b) is not a doubtful question; it is a clear consequence of the governing constitutional standards. We pointed out in our initial brief (p. 24) that,

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* Insofar as the language quoted by the Government (Gov't Br. 20) from United States v. Coke, 364 F.2d 484, 485 (2d Cir. 1966), cert. denied, 386 U.S. 918 (1967), may suggest to the contrary, it is inconsistent with the holding of United States v. Norton, 179 F.2d 527, 529 (2d Cir. 1950), that absence of evidence of an element of a crime constitutes plain error even where no specific objection was made below. In any event, this Court expressly stated in United States v. Coke that "[w]e do not, however, rely on waiver or lack of specificity of the objection in affirming the appellant's conviction", 364 F.2d at 485, and no subsequent decision has relied on Coke for the language quoted by the Government.

so far as we have been able to determine, the present case is the very first case in which a District Court has charged the jury in terms of the presumption of 18 U.S.C. § 1201(b), and the Government does not dispute this.

The Government revealed in one of the affidavits which it sought to add to the record on appeal that it was well aware before the trial of the question as to the constitutionality of 18 U.S.C. § 1201(b) (11a). Trial counsel for the defendants, on the other hand, were unaware that there was any such question (18a, 23a-24a). The Government did not apprise either the District Court or defense counsel of the question as to the constitutionality of 18 U.S.C. § 1201(b). Instead, without disclosing the constitutional question, the Government requested and obtained a charge to the jury in terms of 18 U.S.C. § 1201(b) (Government's Requests to Charge, Request No. 14; A301).

The Government knew from the day it commenced this prosecution that it could not prove the interstate or foreign transportation of Mr. Huggins. The Government nevertheless chose to commit its own resources and those of the District Court to an extensive trial in which the issue of interstate or foreign transportation was a critical jurisdictional element. Now the Government is attempting to escape the consequences of its own predictable failure to establish this critical jurisdictional element by alleging a waiver which the facts simply do not support.

POINT II

THE STATUTORY PRESUMPTION OF INTERSTATE OR FOREIGN TRANSPORTATION IS UNCONSTITUTIONAL

We showed in our initial brief (pp. 29-35) that the statutory presumption of 18 U.S.C. § 1201(b) is unconstitutional under the "more likely than not" standard applied in Leary v. United States, 395 U.S. 6 (1969), and a fortiori is unconstitutional under the "reasonable doubt" standard which should properly be applied in this criminal case. Relegating to a footnote its argument against the applicability of the "reasonable doubt" standard,* the Government argues that the presumption of 18 U.S.C. § 1201(b) satisfies the "more likely than not" standard of Leary for two distinct reasons. First,

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* Relying upon a suggestion in United States v. Tavoularis, 515 F.2d 1070, 1075 n.11 (2d Cir. 1975), the Government argues that the "reasonable doubt" standard should not be applied to the presumption of interstate transportation in the present case because, the Government asserts, there was "substantial circumstantial evidence" of interstate transportation (Gov't Br. 27 n.*). This argument is without merit for two reasons. First, as shown in Point III below, there was insufficient evidence of interstate transportation - circumstantial or otherwise - to sustain defendants' conviction on Counts One and Two. Second, this Court suggested in United States v. Tavoularis, 515 F.2d 1070, 1075 n.11 (2d Cir. 1975), that the reasonable doubt standard should be applied both where "the inference was the only evidence tending to prove an essential element of the crime" and where "the jury was told that the inference alone was sufficient to establish such an element". In the present case the District Court's charge plainly indicated to the jury that the essential element of interstate transportation could be established by the statutory presumption alone (A301).

the Government argues that the presumption is supported by "common experience" and therefore does not need to be supported by empirical data (Gov't Br. 27-30). Second, the Government argues that the presumption is in fact supported by empirical data (Gov't Br. 31-36). Both of these arguments are wrong.

The Government's argument that the presumption of interstate transportation of a kidnapped person who is not released within 24 hours is supported by "common experience" is based upon the Government's contention that the longer a kidnapped person is missing, the greater the likelihood that he has been transported across a State line (Gov't Br. 28). This argument is beside the point. In order to sustain the presumption of 18 U.S.C. § 1201(b), even under the "more likely than not" standard of Leary, it is not sufficient for this Court merely to find that a kidnapped person who has been held longer than 24 hours is more likely than other kidnapped persons to have been taken across a State line; rather, this Court must find that at least a majority of the kidnapped persons who have been held longer than 24 hours have been taken across a State line. Thus in Leary itself the question the Supreme Court asked was not whether possessors of marihuana are more likely than other persons to know that their marihuana has been illegally imported (it would seem obvious that they are), but whether "a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that their

marihuana was grown abroad." Leary v. United States, 395 U.S. 6, 47 (1969). As shown in our initial brief (p. 35), "common experience" furnishes no support for any finding that a majority of the kidnapping cases in which the person kidnapped is not released within 24 hours are cases in which the person kidnapped has been transported across a State line. Such a finding, if it is to be made at all, must be supported by empirical data.

The Government argues in the alternative that the presumption of 18 U.S.C. § 1201(b) is supported by empirical data (Gov't Br. 31-36). The Government relies upon two items of empirical data, one dating from 1932 and the other from 1973. Both of these items of empirical data, upon analysis, prove exactly the contrary of the Government's argument.

The 1932 item of empirical data referred to by the Government is a statement of a Chicago police commissioner that "it has been my observation that the victims, in a majority of the cases have been transported across State lines" (Gov't Br. 33). The Government fails to mention that this statement was part of a survey of police officials conducted by the proponents of the Federal kidnapping legislation which was enacted in 1932, and that out of the 279 kidnappings reported in the survey, only 44 involved transportation across State lines. Hearing on H.R. 5657 Before the House Committee on the Judiciary, 72d Cong., 1st

Sess., Serial 4, at 5, 12-13 (1932). Thus, whatever may have been the local situation in Chicago in 1932, the empirical data indicate that even before the enactment of Federal kidnapping legislation in 1932, interstate kidnappings represented a distinct minority of the total number of kidnappings.*

The 1973 item of empirical data relied upon by the Government consists of statistics provided by the FBI which show that of the 1,615 kidnapping cases investigated by the FBI during calendar year 1973, 146 cases were prosecuted in State courts due to lack of Federal jurisdiction under 18 U.S.C. § 1201(a) (Gov't Br. 34-36). The Government admits in a footnote that for purposes of this case the relevant comparison is between the number of kidnapping cases actually prosecuted in the Federal courts during 1973 and the 146 cases which were prosecuted in State courts because of lack of Federal jurisdiction, but the Government says that "it is not precisely clear how many of the 1,615 cases actually were prosecuted" (Gov't Br. 35 n.*). The fact is that readily available statistics show that the number of

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* Moreover, one of the major purposes of the 1932 Federal kidnapping legislation was to deter interstate kidnappings. See, e.g., Hearing on H.R. 5657 Before the House Committee on the Judiciary, 72d Cong., 1st Sess., Serial 4, at 6, 10, 27 (1932). To the extent that Federal legislation has deterred interstate kidnappings, it has further reduced the percentage of interstate kidnappings from that reported in 1932.

Federal kidnapping prosecutions has been less than 146 for each of the fiscal years from fiscal 1969 to fiscal 1976.* Accordingly, the empirical data make clear that even among the cases of kidnapping which are investigated by the FBI and subsequently prosecuted, the cases which involve interstate transportation of the kidnapped person are in the minority.

Thus, far from supporting the presumption of 18 U.S.C. § 1201(b) that a kidnapped person who has not been released within 24 hours has been transported across a State line, the empirical data relied upon by the Government demonstrate that this presumption is contrary to fact in at least a substantial majority of cases.** It follows that the presumption is unconstitutional both under the "more likely than not" standard of Leary v. United States, 395 U.S. 6 (1969), and under the "reasonable doubt" standard which should properly be applied in this case.

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* The reports of the Administrative Office of the United States Courts show that the number of kidnapping prosecutions commenced in the United States District Courts was 65 in fiscal 1969, 75 in fiscal 1970, 84 in fiscal 1971, 122 in fiscal 1972, 98 in fiscal 1973, 127 in fiscal 1974, 134 in fiscal 1975, and 75 in fiscal 1976. 1972 Report of the Director of the Administrative Office of the United States Courts 365; 1976 id. 347.

** The Government attempts to excuse its failure to provide any probative factual support for the presumption of 18 U.S.C. § 1201(b) by suggesting that the burden of proof on this issue is upon the defendants (Gov't Br. 31 n.*). This is not the law, and the Government cites no authority in support of its suggestion.

Finally, the Government suggests that even if the presumption of 18 U.S.C. § 1201(b) would be unconstitutional as applied to another set of facts, the presumption must be upheld in the present case because there was other evidence of interstate transportation (Gov't Br. 36-37). There are two independently sufficient answers to this contention. First, as shown in Point III below, the evidence before the jury was not sufficient to permit a reasonable person to conclude beyond a reasonable doubt that Mr. Huggins was transported across a State line. Second, even if there were sufficient evidence of interstate transportation, the fact that the jury may have relied in whole or in part upon the unconstitutional presumption instead of upon other evidence would require reversal. See, e.g., Leary v. United States, 395 U.S. 6, 31-32 (1969); United States v. Romano, 382 U.S. 136, 138-39 (1965); Bollenbach v. United States, 326 U.S. 607, 614 (1946); cf., e.g., Stubbs v. Smith, 533 F.2d 64, 70-71 (2d Cir. 1976).

POINT III

THERE WAS INSUFFICIENT EVIDENCE THAT MR. HUGGINS WAS TRANSPORTED IN INTERSTATE OR FOREIGN COMMERCE

We showed in our initial brief (pp. 38-39) that the only piece of evidence tending to indicate that Mr. Huggins might have been transported in interstate or foreign commerce was the testimony by Miss Burch that Burnell had told her some time between November 7 and November 18, 1976 that Moore would (or would probably) have someone take Mr. Huggins out of the states, where he would never be found again. We further showed that this testimony did not constitute sufficient evidence for the jury to find that Mr. Huggins was in fact taken out of the states, both because the future acts of one person may not be proved by the statements of another person (see our initial brief, pp. 39-40) and because a statement of intent to perform an act may not serve as the sole proof that the act was later performed (see our initial brief, pp. 40-41). The Government attempts to controvert the first of these propositions,*

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* The Government argues that the statement that Moore would have some third person take Mr. Huggins out of the states could be considered as a declaration regarding an act to be performed in furtherance of a conspiracy (Gov't Br. 40-41 n.*). As pointed out in our initial brief (p. 40 n.*), this argument is refuted by the finding of the District Court that there was no proof of any conspirators other than the two defendants. The Government attempts to avoid this conclusion by suggesting that Moore could have had some third person transport Mr.

but makes no attempt to dispute the second.

Instead, the Government now attempts to establish the essential element of interstate or foreign transportation by advancing an entirely new theory, that Mr. Huggins was transported to New Jersey (Gov't Br. 39-42). This theory, of course, directly contradicts the theory that Mr. Huggins was transported out of the states, which was the only theory of interstate or foreign transportation argued by the Government to the jury (Tr. 1799). The Government's new theory represents nothing more than a post hoc rationalization of counsel on appeal, which cannot be invoked to support a verdict which clearly did not rest upon any such theory. See, e.g., Bollenbach v. United States, 326 U.S. 607, 613 (1946); cf., e.g., NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 442-44 (1965); SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947).

Moreover, the Government's new theory that Mr. Huggins was transported to New Jersey is based entirely upon speculation. The Government argues that it was to the kidnappers' advantage to transport Mr. Huggins out of his immediate neighborhood; that New Jersey was relatively close to the Bronx, where Burnell and Moore lived; and that the ransom money was to be deposited at a lookout point on the Palisades Interstate Parkway in New Jersey (Gov't Br. 41-42). But Manhattan, Long Island, and

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Huggins out of the states without knowing about the kidnapping (Gov't Br. 40 n.*), but this suggestion strains common sense to the breaking point and is without any support in the record.

Westchester are even closer to the Bronx than New Jersey, and the finding of Mr. Huggins's car at Kennedy Airport (Tr. 1152) points, if anything, toward Long Island rather than toward New Jersey. And although the ransom money was to be delivered in New Jersey, there was never any indication that Mr. Huggins would be released there; on the contrary, Miss Wigfall was instructed to return to the Nathan's parking lot in the Bronx, where she would receive a call telling her where to find Mr. Huggins (Tr. 153).

In determining the sufficiency of the evidence, weight must of course be given to the right of the jury to "draw justifiable inferences of fact". United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947). But this does not mean that a verdict may be supported by inferences which are no more than speculation. As in United States v. Tavoularis, 515 F.2d 1070, 1074-77 (2d Cir. 1975), where an essential element of the crime charged is established solely by speculation, the evidence is insufficient to support a conviction. See, e.g., United States v. Infanti, 474 F.2d 522, 526-27 (2d Cir. 1973); United States v. Kearse, 444 F.2d 62, 64 (2d Cir. 1971); United States v. Cianchetti, 315 F.2d 584, 588 (2d Cir. 1963); United States v. Baker, 50 F.2d 122, 123-24 (2d Cir. 1931).

Finally, the Government argues that if the evidence of interstate or foreign transportation in the present case

is insufficient, "there could never be a kidnapping prosecution where the victim's subsequent whereabouts are unknown" (Gov't Br. 43 n.**). This argument is wrong. Even where the subsequent whereabouts of the kidnapped person are unknown, a kidnapping prosecution may be brought in a State court; and in a case such as the present case, where there is no evidence that a kidnapped person was transported in interstate or foreign commerce, any prosecution should be brought in a State court rather than in a Federal court.

POINT IV

THERE WAS INSUFFICIENT EVIDENCE THAT BURNELL MADE THE TELEPHONE CALL TO SOUTH CAROLINA

We showed in our initial brief (pp. 42-47) that the only identification of the voice of the man who called the home of Mr. Huggins's parents in Charleston, South Carolina on December 1, 1976 was made under circumstances which gave rise to "a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). The Government cites several cases which have rejected similar contentions (Gov't Br. 47), but the suggestiveness of the identification procedure followed by the Government in the present case was far more extreme than in the cases cited, and fully comes within the holding of Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966) (in banc), and the cases which have followed it.

The Government also argues that there was sufficient circumstantial evidence to support a finding that Burnell made the telephone call to South Carolina (Gov't Br. 48-49). This argument, which amounts to a contention that the Government did not need to introduce any direct evidence that Burnell made the critical telephone call to South Carolina, is unsupported by authority. Even if this argument were sound, however, the fact that the jury may have relied (and probably did rely) upon the improperly suggestive identification calls for reversal (see p. 15 supra and authorities cited).

CONCLUSION

For the reasons given above and in the Brief for Defendant-Appellant Harold Burnell, the judgment of conviction entered against defendant-appellant Harold Burnell by the United States District Court for the Southern District of New York on April 22, 1977 should be reversed, and the case should be remanded with directions to dismiss the indictment against defendant-appellant Harold Burnell or, in the alternative, to grant a new trial to defendant-appellant Harold Burnell.

Dated: New York, New York
September 7, 1977

Respectfully submitted,

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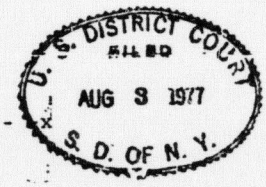

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

HAROLD BURNELL and
VANKIRK MOORE,

Defendants.

ORDER TO SHOW CAUSE

76 Cr. 1121 (VLB)

Upon the annexed affidavit of Eugene Neal Kaplan, Assistant United States Attorney, sworn to on August 3, 1977, and upon all prior proceedings had herein, it is hereby

ORDERED that Harold Burnell and Vankirk Moore, defendants herein, show cause before this Court at the United States Courthouse, Foley Square, New York, New York in Room 318, on August 4 1977, at 2 P.M., or as soon thereafter as counsel can be heard, why an order should not be entered, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, permitting the United States Attorney to supplement the record in the instant case, now on appeal to the United States Court of Appeals for the Second Circuit, and it is hereby further

ORDERED that personal service of a copy of this order and the papers on which it is based upon David Blackstone, Esq., 401 Broadway, New York, New York, attorney on appeal for defendant Vankirk Moore, and Guy Miller Struve, Esq., Davis, Polk & Wardwell, 1 Chase Manhattan Plaza, New York, New York, attorney on appeal for defendant Harold

Burnell, on or before August 3, 1977, at ~~5:00~~ 2:00 P.M., shall be deemed sufficient.

Dated: New York, New York
August 3d, 1977.

VINCENT L. BRODERICK
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- v - : AFFIDAVIT

HAROLD BURNELL and : 76 Cr. 1121 (VLB)
VANFIRK MOORE,
:
Defendants.
:
- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

EUGENE NEAL KAPLAN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and have charge of the prosecution of the above-captioned matter. I submit this affidavit in support of the Government's application for an order to show cause, as well as in support of the entry of relief pursuant to Fed.R.App.P. 10(e).

2. In this proceeding, the Government seeks the entry of an order, attached hereto as Exhibit 1, permitting the supplementation of the record on appeal in the instant case pursuant to Fed.R.App.P. 10(e). The Government seeks to supplement the record on appeal with affidavits both of myself and of Lawrence Farkash, Esq., Chief Criminal Clerk in the office of the United States Attorney for the Southern District of New York, who has assisted me in the prosecution of this matter. My affidavit is annexed hereto as Exhibit 2 and the Farkash affidavit is appended as Exhibit 3.

3. The circumstances that prompt the Government's present application can be briefly set forth. As your Honor is aware from having presided over all judicial stages of this case following the arraignment of these defendants before Judge Carter in Part One, defendants Burnell and Moore were charged with and convicted of the federal offenses of kidnapping, conspiracy to kidnap, conspiracy to commit extortion and the making of an interstate extortionate demand, in violation of 18 U.S.C. §§ 1201(a); 1201(c); 371; 875(a) and 2. On April 22, 1977, this Court sentenced both defendants to terms of life imprisonment for their violation of the kidnapping statute, 18 U.S.C. § 1201(a), and to lesser included concurrent terms on the other counts of the Indictment.

4. As your Honor further is aware, at no time during the proceedings in this Court -- whether by way of pre-trial motion, motion for relief during trial, objection either to the Government's requests to charge or to the Court's instructions to the jury, post-verdict motion, or application for relief or otherwise -- did the defendants or their trial counsel in any way challenge the jurisdiction of this Court to try and determine the guilt of Burnell and Moore on the federal kidnapping charges against them, or, more specifically, attack the constitutionality of the statutory presumption of interstate transportation of the kidnap victim contained in 18 U.S.C. § 1201(b). For but one example, this Court's ruling that it would in substance charge the Government's request number 14 (Trial Transcript ["Tr."] p. 1703) which, in part, contained the statutory

presumption and this Court's actual charge concerning the § 1201(b) presumption (Tr. 2013-15), met absolutely no objection or other adverse comment from the defense.

5. Following the imposition of sentence on these defendants, notices of appeal were filed by each of them (April 22 and 27, 1977) and the Court of Appeals entered scheduling orders (May 23 and June 29, 1977) calling for the filing of the defendants' briefs not later than August 1, 1977 and the filing of the Government's brief in this case by August 31, 1977. Also, by orders of the Court of Appeals (dated May 18 and June 22, 1977), trial counsel for both defendants, Roland Thau, Esq., of the Legal Aid Society (for Burnell), and Lawrence Hochheiser, Esq. (for Moore), have been relieved, and Guy Miller Struve, Esq. (for Burnell), and David Blackstone, Esq. (for Moore), have been appointed to represent these defendants on appeal.

6. Upon reviewing the appellate briefs filed on behalf of these defendants, it appears that the most significant claim of error raised centers on their present assertion that the presumption embraced in 18 U.S.C. § 1201(b) is unconstitutional and that this Court, by instructing the jury with regard to that statutory presumption, committed reversible -- indeed, plain -- error. Needless to say, the Government, for numerous reasons that are not appropriately detailed here, strongly opposes this much belated challenge to the constitutionality of 18 U.S.C. § 1201(b). However, one such ground has precipitated this motion: we assert, and seek leave to demonstrate, that the defendants consciously made a tactical decision not to challenge the jurisdiction of

this Court in general, and the § 1201(b) presumption, in particular. As indicated in the appended affidavits, this was a defense decision made known to the prosecutors in charge of this case almost from the outset of these proceedings. However, at present, while finding implicit support in the trial record, such defense decision is not explicitly supported by any citation to the record on appeal. This fact is quite simply explained because, while Messrs. Thau and Hochheiser were engaged in this case, no need existed to embrace their tactical decision in the trial record in view of both their presence as counsel in this matter and the sound reasons behind their determination. Now, on the other hand, with new counsel for the defendants having entered on the scene and seeking to raise on appeal the precise issue that the defendants consciously waived -- indeed, an issue which prior counsel could not, in good conscience, have raised in view their intentional waiver -- such a supplement to the district court record is warranted in order to present the Court of Appeals with an accurate picture of what actually happened with regard to this important issue.

7. In such circumstances, Rule 10(e) of the Fed.R.App.P. provides that "[i]f anything material to either party is omitted from the record [on appeal] by error or accident . . . the district court, either before or after the record is transmitted to the court of appeals . . . on proper suggestion or of its own initiative, may direct that the omission . . . be corrected, and if necessary that a supplemental record be certified and transmitted [to the appellate court]." In this regard, Professor Moore makes clear that the term "error or accident", as used in this

Rule, should be broadly construed in order "to permit the record to be supplemented by any matter which is properly a part thereof. Omissions from the record may result from the error or inadvertence of the parties, the court reporter, the district court clerk, or the judge. Whatever the source of the "error or accident", that results in the omission, Rule 10(e) authorizes correction of the record to supply the missing matter." 9 J. Moore, Federal Practice ¶ 210.08[1] at p. 1645 (2ed. 1975). For this reason, the Second Circuit has held proper the supplementation of a record on appeal by means of a post-trial affidavit by trial counsel, the contents of which related directly (and dispositively) to an issue raised by successor counsel on appeal. United States v. Sclafani, 487 F.2d 245, 253 (2d Cir.), cert. denied, 414 U.S. 1023 (1973). Thus, as Judge Biggs has noted "[t]he purpose of [this] rule is to permit correction or modification of the record transmitted to the Court of Appeals so that it adequately reflects what happened in the District Court." United States ex rel. Mulvaney v. Rush, 487 F.2d 684, 687 n.5 (3rd Cir. 1973).

8. In the present case, it is clear that the matters contained in the annexed affidavits are material to the issues raised by the defendants on appeal. Furthermore, they were not sooner made part of the record of this case, simply because the matters did not become relevant until after the appellate briefs of the defendants were filed challenging for the [illegible] first time the § 1201(b) presumption. In such circumstances, as in United States v. Sclafani, supra, this Court should, in the first instance (see 9 J. Moore, supra, ¶ 210.08[2] at p. 1650), allow the record on

appeal to be supplemented by the annexed affidavits, thereby enabling the Court of Appeals to accurately view not only the tactical decision of defense counsel not to challenge the § 1201(b) presumption, but also the impact that such decision had upon the prosecution of this case.

9. We are seeking relief by means of an order to show cause, rather than another form of relief, for this reason: Rule 10(e) of the Fed.R.App.P. provides no specific time within which a motion for relief thereunder is to be made returnable in the district court; we wish to refer to the appended affidavits in our brief due to be filed with the Court of Appeals on August 31, 1977, and, thus, seek the issuance of an order to show cause by which this Court, viewing its own calendar, can fix a return date for this application, giving proper consideration to both the nature of our request and the need for expedition in the determination of this issue. Cf., Fed.R.Crim.P. 45(d).

10. There has been no prior request for this or similar relief.

EUGENE NEAL KAPLAN
Assistant United States Attorney

Sworn to before me this
3rd day of August, 1977.

Phyllis G. Rush

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,	:	
- v -	:	ORDER
HAROLD BURNELL and VANKIRK MOORE,	:	76 Cr. 1121 (VLB)
Defendants.	:	

- - - - - - - - - - - - - - - - - - - -x

Upon the application of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, by Eugene Neal Kaplan, Assistant United States Attorney, and after hearing counsel for the defendants Harold Burnell and Vankirk Moore with respect thereto, and upon all prior proceedings had herein, it is hereby

ORDERED, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, that the annexed affidavits of Eugene Neal Kaplan, Assistant United States Attorney, and Lawrence Farkash, Esq., Chief Criminal Clerk of the United States Attorney's Office for the Southern District of New York, be docketed and included by the Clerk of the United States District Court for the Southern District of New York in the record of this case on appeal and that the said affidavits be certified by the said clerk as constituting a supplemental record of this case on appeal and be forthwith transmitted by said clerk to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
August , 1977

VINCENT L. BRODERICK
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	AFFIDAVIT
HAROLD BURNELL and VANKIRK MOORE,	:	76 Cr. 1121 (VLB)
Defendants.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

EUGENE NEAL KAPLAN, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and have at all relevant times been in charge of the prosecution of this case. I submit this affidavit pursuant to Rule 10(e) of the Fed.R.App.P. in order to supplement the record of this case on appeal.

2. The purpose of this affidavit is to set out for this Court and the Court of Appeals the facts underlying the Government's decision to prosecute this case in federal court, rather than deferring to state authorities. As this affidavit will demonstrate, we based this decision not only upon our firm conclusion that a sufficient basis for federal jurisdiction existed, but also upon indications from counsel for the defendants that, as a tactical matter, they would and did not oppose our conclusion in this regard. Based upon these facts, it is the Government's position that the defendants not only waived any objection to the constitutionality of the interestate transportation presumption contained in 18 U.S.C. § 1201(b), but intentionally and consciously

acquiesced in the issue.

3. Prior to the filing of the defendants' appellate briefs, of course, I and others associated with the prosecution had exhaustively reviewed the viability of this presumption. In the period between the filing of the complaint and the trial of this matter, I researched not only this presumption and the leading cases on that subject, but also the provisions of New York law concerning kidnapping and double jeopardy. Indeed, up to and even during the trial of this case, I had discussed with my chiefs and was prepared to deal with any challenge addressed by the defense to the § 1201(b) presumption on the merits and, should I have lost any argument regarding the propriety of federal jurisdiction herein, to have either requested the dismissal of this proceeding in favor of subsequent state charges (which would have been proper under the New York Criminal Procedure Law § 40.20; an option which I had previously discussed with Bronx District Attorney Mario Merola and members of his staff) or to have allowed the jury to consider the interstate aspects of this case on the basis of the other evidence thereof which I considered to be sufficient -- for example, Mary Burch's "Hillmon-like" statement (Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285 (1892)) that defendant Moore intended to have kidnap victim Huggins taken out of the states to a place where he would never be found (see, e.g., Trial Transcript ["Tr."] at pp. 1798-99).

4. Such decisions on my part (or by this Court) never came to pass, however, because at no time prior to their raising this issue on appeal did the defendants or their attorneys ever challenge either the federal jurisdiction over this case or the constitutionality of the § 1201(b) presumption. Never in the District Court, be it by pre-trial, trial or post-trial proceedings, was objection or motion addressed either to this Court's jurisdiction or to the constitutionality of § 1201(b). Indeed, both the Government's requested charge on the presumption (Tr. 1703) and this Court's charge concerning the provisions of § 1201(b) (Tr. 2013-15) met absolutely no objection or other adverse comment from the defense.

5. In addition to the failure to preserve the issue for appeal in the normal procedural sense, and wholly apart from the numerous arguments that the Government will address to the Court of Appeals on this subject, one factual matter, not as yet clear on the record of this case but which properly should be included in view of the substitution of counsel for the defendants on appeal, demonstrates that the defendants' silence was not based upon ignorance, incompetence or mistake, but was a conscious and voluntary decision made for sound tactical reasons.

6. As the accompanying affidavit of Lawrence Farkash, Esq., demonstrates, the decision by Messrs. Roland Thau and Lawrence Hochheiser, respected trial counsel for the defendants, not to challenge the § 1201(b) presumption or the federal jurisdiction, was a conscious, tactical one, designed to avoid the harsher penalties faced by the defendants under New York law, and to have them sentenced, if at

all, in this Court. In a similar vein, on January 4, 1977, I had a discussion with Mr. Hochheiser in your Honor's courtroom, just prior to the commencement of the pre-trial conference scheduled in this matter, reflecting precisely the same calculated decision.

7. During that conversation, Mr. Hochheiser, formerly a New York County Assistant District Attorney, stated, in substance, that the face of the Indictment revealed a basis for federal jurisdiction neither on the interstate kidnapping nor on the interstate extortion charges contained therein and asked me what would happen if he moved to dismiss those kidnapping and extortion counts. My reply, in substance, was that there was, in fact, an adequate factual basis for the federal elements of the charges, but if he successfully moved on that ground, we would, in turn, refer the case to the appropriate local District Attorney for state prosecution. Mr. Hochheiser then asked what the state penalties for kidnapping were. I replied, in substance, that the offense charged against Burnell and Moore would constitute kidnapping in the first degree under the New York Penal Law (§ 135.25), an A-I felony, carrying a maximum term of life imprisonment and a mandatory minimum term of 15 to 25 years in custody (New York Penal Law § 70.00) -- this in contrast to the 0 year to life term of imprisonment faced by these defendants if convicted in federal court. In response to this advice, Mr. Hochheiser responded, in substance, that while he did not believe that we (the Government) could prove federal jurisdiction or that the statutory presumption (§ 1201(b)) was valid, he did not intend to challenge federal jurisdiction for fear of subjecting his client, defendant Moore, to harsher penalties in the state courts were his challenge successful. (Apparently, after

discussing this matter, Mr. Thau reached a conclusion similar to that of Mr. Hochheiser (see Farkash Affidavit submitted herewith).)

8. As the foregoing conversation between Mr. Hochheiser and myself well illustrates, the decision by defense counsel not to challenge federal kidnapping jurisdiction or the § 1201(b) presumption in this case was a conscious one based upon their view of their clients' best interest. I might add only that, as Mr. Hochheiser, my then student assistant and myself exited from the courtroom following the imposition of a life sentence on defendant Moore, on April 22, 1977, Mr. Hochheiser turned to me and said, in substance, "You know, you lose on the presumption", thereby indicating, at least to your deponent, that defense counsel was well aware and consciously refrained from raising throughout and even after the trial the precise issue now so strongly urged by these defendants on appeal.

/s/ EUGENE NEAL KAPLAN

EUGENE NEAL KAPLAN
Assistant United States Attorney

Sworn to before me this
30th day of August, 1977.

/s/

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4613798
Qualified in Bronx County
Commission Expires March 30 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
- v -	:	AFFIDAVIT
HAROLD BURNELL and VANKIRK MOORE,	:	76 Cr. 1121 (VLB)
Defendants.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

LAWRENCE FARKASH, being duly sworn, deposes and says:

1. I am the Chief Criminal Clerk in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and a member of the bar of this Court.

2. I am thoroughly familiar with the facts of this case, having assisted Assistant United States Attorney Eugene Neal Kaplan throughout its prosecution.

3. I make this affidavit for inclusion in the record of this case on appeal, pursuant to Fed.R.App.P. 10(e), because, in view of the substitution of counsel for the defendants, the contents hereof bear relevance to the issue raised on appeal by Burnell and Moore concerning the presumption contained in 18 U.S.C. § 1201(b).

4. On Friday, July 8, 1977, I had a conversation with Roland Thau, Esq., of the Legal Aid Society, defendant Harold Burnell's trial attorney, in my office at 1 St. Andrew's Plaza, New York, New York.

5. During the course of that conversation, Mr. Thau stated that he and co-trial counsel for defendant Vankirk Moore (Lawrence Hochheiser, Esq.) had discussed the jurisdiction of this court over defendants Burnell and Moore with respect to the kidnapping charges against them. He further indicated that he and Hochheiser had made a conscious tactical decision not to challenge such jurisdiction under the federal kidnap statute in the District Court (including the presumption embraced in 18 U.S.C. § 1201(b)) because of the harsher sentencing provisions faced by the defendants if tried and convicted of similar offenses in the state courts.

/S/
LAWRENCE FARRASH
Chief Criminal Clerk

Sworn to before me this
3rd day of August, 1977.

/S/

PHYLLIS A. RUSH
Notary Public, State of New York
No. 03-4633198
Qualified in Bronx County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

v. : 76 Cr. 1121 (VLB)

HAROLD BURNELL and VANKIRK MOORE, :

Defendants. : AFFIDAVIT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROLAND THAU, being duly sworn, says:

1. I am a member of the Bar of this Court and of the Federal Defender Services Unit of the Legal Aid Society. I served as trial counsel for defendant Harold Burnell in the above-entitled case. I make this affidavit in response to the motion of the United States of America to supplement the record on appeal pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

2. I did not at any time make any decision not to attack Federal jurisdiction in this case, in order to avoid State prosecution or for any other reason. On the contrary, I made a motion for a judgment of acquittal on behalf of defendant Harold Burnell based, among other things, on the Government's failure to prove beyond a reasonable doubt the essential Federal jurisdictional elements of interstate transportation under 18 U.S.C. § 1201(a)(1) and of an interstate telephone call under 18 U.S.C. § 875(a).

3. I did not discuss with defendant Harold Burnell at any time the possibility of not attacking Federal jurisdiction in this case, and Mr. Burnell at no time authorized me not to attack Federal jurisdiction in this case.

I did not discuss at any time with Lawrence Hochheiser, Esq., trial counsel for defendant Vankirk Moore, the possibility of not attacking Federal jurisdiction in this case, and Mr. Hochheiser never told me of any conversation he may have had with Mr. Kaplan regarding this subject.

4. It is true that I did not object to the portion of the Court's charge which referred to the presumption of 18 U.S.C. § 1201(b). This was not because of any tactical decision not to attack Federal jurisdiction; as stated above, I never made any such decision. The reason I did not object to the Court's charge concerning the presumption was simply that it had not occurred to me that the presumption might be unconstitutional. The first time I became aware that the presumption might be unconstitutional was in a conversation with David Blackstone, Esq., appellate counsel for defendant Vankirk Moore, which took place more than one month after the judgment of this Court was entered.

5. The affidavit of Lawrence Farkash, Esq., sworn to on August 3, 1977, states that I told Mr. Farkash that I had discussed with Mr. Hochheiser the jurisdiction of this Court over the defendants with respect to the kidnapping charges against them (Farkash Aff., par. 5). I did not have any such discussion with Mr. Hochheiser, and I did not tell Mr. Farkash that I had had any such discussion. Mr. Farkash's affidavit further states that I indicated to Mr. Farkash that Mr. Hochheiser and I had made a conscious tactical decision not to challenge the jurisdiction of this Court under the Federal kidnapping statute (including the presumption of 18 U.S.C. § 1201(b)) because of the harsher sentencing provisions for kidnapping under State law (Farkash Aff., par. 5). I did not make any such decision, and I have no reason to believe that Mr. Hochheiser made

any such decision. I did not indicate to Mr. Farkash that either Mr. Hochheiser or I had made any such decision.

Sworn to before me this
4th day of August, 1977.

INEZ BABB
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-0122040
Qualified in Kings County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	76 Cr. 1121 (VLB)
HAROLD BURNELL and VANKIRK MOORE,	:	
Defendants.	:	AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HAROLD BURNELL, being duly sworn, says:

1. I am one of the defendants in the above-entitled case. I make this affidavit in response to the motion of the United States of America to supplement the record on appeal pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

2. At no time did I authorize my counsel not to challenge the jurisdiction of the Federal courts or the constitutionality of the presumption of 18 U.S.C. § 1201(b) in this case. In fact, at no time did my counsel even discuss with me the possibility of not challenging the jurisdiction of the Federal courts or the constitutionality of the presumption of 18 U.S.C. § 1201(b). At no time did my counsel discuss with me the possible penalties for kidnapping under New York State law. At no time did I make or join in any decision not to challenge the jurisdiction of the Federal courts or the constitutionality of the presumption of 18 U.S.C. § 1201(b), because of the possible penalties for kidnapping under New York State law or for

any other reason.

Sworn to before me this

4th day of August, 1977.

GUS MIL[illegible] STRUVE
Notary Public [illegible] of New York
No. 31-[illegible]7620
Qualified in New York County
Commission Expires March 30, 197[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA

- against -

HAROLD BURNELL and VANKIRK MOORE,

Defendants.

76 Cr. 1121 (VLB)

AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LAWRENCE HOCHHEISER, being duly sworn, says:

1. I was trial counsel for Vankirk Moore in the above-captioned action.

2. I write this affidavit at the request of appellate counsel in response to the affidavits of Eugene Neal Kaplan and Lawrence Farkash, each sworn to August 3, 1977, and filed in support of the government's application to supplement the record pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

3. In his affidavit, paragraph 6, Eugene Kaplan states that "the decision by ... trial counsel ... not to challenge the Section 1201(b) presumption on the federal jurisdiction was a conscious, tactical one ... ." This should be clarified. I did indeed consciously choose not to make a pre trial motion to dismiss the indictment upon grounds the government lacked jurisdiction over the kidnapping. I reasoned that were such a motion granted at that stage of the proceedings, the victory would be a

pyric one because jeopardy had not yet attached and I was certain an indictment in the State court would quickly be filed. My client then would face the mandatory minimum sentence of 15 - 25 years and a manditory maximum of life 25. Moreover, I was not unmindful of the reputed better quality of life in a federal prison as compared with state prison. It should be pointed out, however, that in engaging in this thought process I never considered the possibility that the presumption of federal jurisdiction was unconstitutional.

4. My thinking in not moving to dismiss the kidnapping charge prior to trial has been explained. This is to be distinguished, however, from the reason for my not objecting to the court's charge concerning the presumption of federal jurisdiction. At this stage of the proceedings a dismissal or acquittal concerning the kidnapping charges would have had a different impact altogether. For I believe that the courts would have [illegible] to find a subsequent prosecution violative of the double jeopardy clause of the United States Constitution. Even those who might disagree with this view of double jeopardy, I believe, would have to concede it to be a very strong and arguable legal position. The reason I did not object to the court's charge concerning the presumption, then, was simply that I did not consider the possibility that the presumption was constitutionally defective.

5. Trying to reconstruct the events described above is not entirely simple. There are, however, two important corroborating factors which I believe worthy of note:

(a) I was fortunate to have as co-counsel Roland Thau of the Legal Aid Society. I had worked with Mr. Thau before and came to highly respect his views on legal questions, especially novel or knotty ones. For this and other reasons Mr. Thau and I shared throughout the trial all of our important legal thinking and carefully consulted each other before accepting or rejecting any course of action. Indeed, even on those occasions when the record shows our positions were diametrically opposed, forcing the court to rule for one side or the other, we had consulted each other first, even if briefly, in order to either avoid the disagreement or to at least be sure it was unavoidable. Accordingly, in preparation of this affidavit, I have reviewed the facts with Mr. Thau. Since Mr. Thau says he too had not considered the unconstitutionality of the presumption until recently, obviously I could not have mentioned it to him. As I have said, had the argument occurred to me, I most certainly would have told Mr. Thau of it and asked his opinion. As certain as I am that I would have had such a consultation before using an important legal argument, I am even more certain I would have done so before rejecting and remaining silent about an important legal argument.

(b) When David Blackstone was first appointed to prosecute Mr. Moore's appeal, he telephoned me and asked what I thought were points available for appeal. This he did, I believe, before seeing the trial transcript in order to get better acquainted with the case. I told Mr. Blackstone that which I could think of. I did not mention the constitutionality of the presumption. I did not mention it because I had never thought of it. Indeed Mr. Blackstone, to his great credit, seems to have been the first of the defense lawyers to have considered this issue.

6. Mr. Kaplan's paragraph 8 should be explained since it purports to quote me. It is impossible for me to recall the exact words or the exact sentences Mr. Kaplan or I uttered upon leaving the courtroom, or indeed at any other time. Thus, I cannot really say whether the exact quotes proffered by Mr. Kapan are correct, incorrect, or some of each. I can, however, explain the conversation. This conversation concerned not the constitutionality of the presumption but rather the rebutability of presumption. The prosecution and defense seemed to agree that were it proved subsequent to trial that the kidnap victim had never in fact been taken out of the state, a motion, upon the grounds of newly discovered evidence, could successfully be made to set aside the conviction. This was important because shortly prior to the sentencing I had told Mr. Kaplan and the court that Mr. Moore was going to help the authorities locate the body of the victim.* I believed the body was in the State of New York. Thus, I believed that ultimately the government might "lose on the presumption." The way the court sentenced Mr. Moore made this an appropriate subject of conversation with Mr. Kaplan following the sentencing. This was so because Mr. Moore had been, I believe, in effect sentenced to five years except for the concurrent life sentence imposed on the kidnapping count. (and the 10 yr Sentence on the Kidnapping Conspiracy Count) Thus, the potential discovery of the body together with whatever further evidence would flow therefrom seemed likely material for vacating the kidnapping conviction. And were

J.H.

*Vankirk Moore has, from the time of his arrest vehemently maintained his innocence. He does claim, however, to have some information concerning the ultimate fate of the victim. According to Moore, this knowledge comes from those who were privy to these events.

this to come to pass, in view of the remaining sentences totaling only five years, Mr. Kaplan might indeed be said to "lose on the presumption." In any event the conversation allegedly correctly quoted by Mr. Kaplan never rose to any level of formality. It was indeed simply the musings and taunting of adversary players who had grown to like and "kibbitz" each other. If lawyers had locker rooms, the conversation in Mr. Kaplan's paragraph 8 would be best understood if characterized as "locker room balony."

Lawrence Hochheiser

SWORN TO BEFORE ME THIS
5th DAY OF AUGUST, 1977.

KENNETH J. ARONSON
Notary Public, State of New York
No. 30-4610158
Qualified in Nassau County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, 76 Cr. 1121

v. (VLB)

HAROLD BURNELL and VANKIRK MOORE, AFFIDAVIT

Defendants.

----------x

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

VANKIRK MOORE, being duly sworn, says:

1. I am one of the defendants in the above-captioned case and submit this affidavit in response to the motion of the government to supplement the record on appeal pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure.

2. The first time I ever learned that the presumption of 18 U.S.C.§1201(b) could be attacked as unconstitutional is after I received a copy of my appellate counsel's brief and read what my counsel said in it.

At no time did Lawrence Hochheiser, my court appointed counsel in the District Court, ever mention to me anything about attacking the constitutionality of §1201(b) or for that matter, anything about the possibility that the presumption may be attacked as unconstitutional. Finally, Mr. Hochheiser never asked me to give up my right to attack the constitutionality of §1201(b), and I never authorized him to do it.

Sworn to before me this
4th day of August, 1977

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	76 Cr. 1121
-against-	:	(VLB)
HAROLD BURNELL and VANKIRK MOORE,	:	MEMORANDUM ORDER
Defendants.	:	

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VINCENT L. BRODERICK, J.S.D.J.

The Government has applied for an order pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure permitting the United States Attorney to supplement the record in this matter, which is on appeal.

The materials which would be added to the record are affidavits of the attorneys representing the Government in the trial of this action, to the effect that one defense counsel told a Government attorney during the trial, and the second defense counsel told a second Government attorney after the trial (and after the appeal had been taken), that defense counsel at the trial had made a tactical decision to challenge neither federal jurisdiction nor the validity of the statutory presumption provided for in 18 U.S.C. §1201(b).

The Government's application is opposed by appellate attorneys for defendants, who submitted responsive affidavits which disputed, at least in part, the factual assertions in the affidavits by Government counsel.[1]

The Government's application for an order permitting that the record be supplemented is denied.

Rule 10(e) is directed to material matters that are omitted from the record "by error or accident". The thought processes of defense counsel, even though disclosed to Government counsel, are simply not in the record and should not be added. It is conceivable that, once a defendant's attorney had reported his thought processes to Government counsel, either Government counsel or defense counsel might, on an appropriate occasion, have seen to it that they did in fact become part of the record, in colloquy or otherwise. In point of fact, no such occasion was apparently found, because there is nothing in the record, as I recall, with respect to the matter. It would be inappropriate to add materials with respect to those thought processes to the record at this point, since all of my legal rulings (and certainly all of the jury's factual determinations) were made without benefit of knowledge of those processes.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
August 5, 1977

FOOTNOTE

1. At the argument, Government counsel amended its application to request that the record be supplemented by all affidavits submitted with respect to the matter, those by the Government and those submitted in opposition.

Received for David Blackstone
2 copies of Reply Brief on 9/7/77

D. Fiddes.